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September 2, 2011

RECEIVED
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PUBLIC SERVICE COMMISSION

VIA HAND DELIVERY
Hon. Jeff Derouen
Executive Director
Public Service Commission
of the Commonwealth of Kentucky
211 Sower Blvd.
Frankfort, KY 40601

Re: ***In the Matter of Ballard Rural Telephone Cooperative Corporation, Inc.; Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Foothills Rural Telephone Cooperative, Inc.; Gearheart Communications Co., Inc.; Highland Telephone Cooperative Inc.; Logan Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; Peoples Rural Telephone Cooperative, Inc.; South Central Rural Telephone Cooperative Corporation, Inc.; Thacker-Grigsby Telephone Company, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc. v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky***

Dear Mr. Derouen:

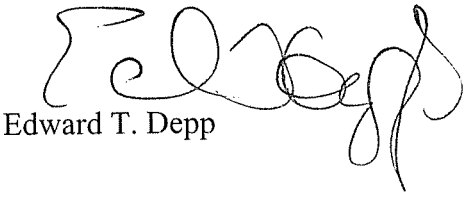
Enclosed for filing an (1) one original and eleven (11) copies of the RLECs' Brief Regarding the Effects of Halo Wireless, Inc.'s Bankruptcy Filing in regard to the above referenced matter.

Please file-stamp one copy of each of the items listed above, and return it to our courier.

Thank you, and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



Edward T. Depp

ETD/kwi

Enclosures

cc: John E. Selent, Esq.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Ballard Rural Telephone Cooperative Corporation, Inc.; Brandenburg Telephone Company; Duo County Telephone Cooperative Corporation, Inc.; Foothills Rural Telephone Cooperative, Inc.; Gearheart Communications Co., Inc.; Highland Telephone Cooperative Inc.; Logan Telephone Cooperative, Inc.; Mountain Rural Telephone Cooperative Corporation, Inc.; North Central Telephone Cooperative Corporation; Peoples Rural Telephone Cooperative, Inc.; South Central Rural Telephone Cooperative Corporation, Inc.; Thacker-Grigsby Telephone Company, Inc.; and West Kentucky Rural Telephone Cooperative Corporation, Inc.	)	**Case No. 2011-00199**
Complainants	)	
v.	)	
BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky	)	
Defendant	)	

THE RLECS' BRIEF REGARDING THE EFFECT OF HALO WIRELESS, INC.'S BANKRUPTCY FILING

The RLECs[1], by counsel, submit the following brief to address concerns raised by the Public Service Commission of the Commonwealth of Kentucky (the "Commission") about how

[1] Ballard Rural Telephone Cooperative Corporation, Inc. ("Ballard Rural"), Brandenburg Telephone Company ("Brandenburg"), Duo County Telephone Cooperative Corporation, Inc. ("Duo County"), Foothills Rural Telephone Cooperative, Inc. ("Foothills"), Gearheart Communications Co., Inc. ("Gearheart"), Highland Telephone Cooperative, Inc. ("Highland"), Logan Telephone Cooperative, Inc. ("Logan Telephone"), Mountain Rural Telephone Cooperative Corporation, Inc. ("Mountain Rural"), North Central Telephone Cooperative Corporation ("North Central"), Peoples Rural Telephone Cooperative, Inc. ("Peoples"), South Central Rural Telephone

Halo Wireless, Inc.'s ("Halo") Suggestion of Bankruptcy, Notice of Stay, and Notice of Extensions affects this case.

First, although Halo's bankruptcy may result in an automatic stay of claims against Halo directly, it does not justify a stay of the RLECs' claims for access charges against BellSouth Communications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky"), which remains solvent. Second, whether or not the Commission is empowered to halt the Halo traffic (and under certain circumstances it may be), it unquestionably retains the authority to hold AT&T Kentucky financially responsible for the traffic it is sending to the RLECs' networks. Any delay of payment is inappropriate -- the traffic in question already implicates more than a million dollars in unpaid access charges, and the total amount is growing daily. Resolution of the question of financial liability is a matter of the utmost importance and urgency to the RLECS. In support of these positions, the RLECs state as follows.

I. Halo's Bankruptcy Does Not Require a Stay of the RLECs' Claims Against AT&T Kentucky.

The Commission has questioned whether Halo's bankruptcy mandates a stay of the claims in this matter. The RLECs maintain that a stay is not required – and would be inappropriate – because AT&T Kentucky is not the bankrupt debtor and because the RLECs' claims against AT&T Kentucky can be fully resolved without directly involving Halo.

When a debtor such as Halo petitions for bankruptcy, Section 362 of the Bankruptcy Code requires an automatic stay of the "continuation . . . of a judicial, administrative, or other proceeding against the Debtor that was or could have been commenced before the commencement of the case under this Title, or to recover a claim against the Debtor that arose

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Cooperative Corporation, Inc. ("South Central"), Thacker-Grigsby Telephone Company, Inc. ("Thacker-Grigsby"), and West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky") (collectively, the "RLECs")

before the commencement of the case under this Title . . . ." 11 U.S.C. 362 (a)(1) (emphases added). This automatic stay "does not apply to 'separate legal entities such as corporate affiliates, partners in debtor partnerships, or to codefendants in pending litigation.'" *Butler v. Cooper Standard Automotive, Inc.*, 376 Fed. Appx. 487, 492 (6th Cir. 2010) (*quoting Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993)). *See also In re: Delta Airlines*, 310 F.3d 953, 956 (6th Cir. 2002) ("In the absence of unusual circumstances, the automatic stay does not halt proceedings against solvent codefendants."); *In the Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1147 (5th Cir. 1987) (synthesizing cases from a number of courts to conclude that "a nonbankrupt codefendant may be protected by the automatic stay of section 362(a)(1) if extension of the stay contributes to the debtor's efforts of rehabilitation or the debtor and nonbankrupt are closely related."). Even in cases where successful claims against a nonbankrupt third party "would probably result in a lawsuit by that [nonbankrupt third party] against the debtors seeking indemnification," the automatic stay does not extend beyond the initial debtor. *In the Matter of: TXNB Internal Case*, 483 F.3d 292, 302 (5th Cir. 2007).

Here, the RLECs' complaint was filed against AT&T Kentucky. The RLECs seek relief from AT&T Kentucky directly. The RLECs do not seek any relief whatsoever from Halo.

Halo is the only bankruptcy debtor, and the only party to which a Section 362 stay applies. AT&T Kentucky is solvent and, at most, a codefendant of Halo. Because Section 362's "automatic stay does not halt proceedings against solvent codefendants," the RLECs' claims directly against AT&T Kentucky are not affected by Section 362's requirement of an automatic stay of claims against Halo. *In re: Delta Airlines*, 310 F.3d at 956 (6th Cir. 2002). *See generally* 11 U.S.C. 362 (a)(1); *Butler*, 376 Fed. Appx. at 492 (6th Cir. 2010).

For these reasons, any automatic stay of claims against Halo does not require a stay of the RLECs' claims against AT&T Kentucky.

II. The Commission Retains the Authority to Find AT&T Liable to the RLECs' and to Award the RLECs' Requested Financial Damages.

The Commission has also questioned whether, in light of the automatic stay of claims against Halo, it has the authority to slow or halt the traffic in question. Under certain circumstances,[2] the Commission may well have the power to authorize AT&T Kentucky to terminate service to Halo, the question is largely irrelevant to the RLECs' claims against AT&T Kentucky for financial compensation. Whether Halo's traffic can be altered, and whatever the status of AT&T Kentucky's claims against Halo, the Commission retains the authority to order AT&T Kentucky to compensate the RLECs at the tariffed rate for the RLECs' provision of access services. Indeed, a final ruling on the question of AT&T Kentucky's financial liability is urgent, given that the RLECs are already faced with more than a million dollars in unpaid access charges.

The Halo traffic delivered by AT&T Kentucky to the RLECs is access traffic subject to the RLECs' lawfully-filed and approved tariffs. AT&T Kentucky cannot rely on Halo's

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[2] *See* 11 U.S.C. § 366(b) ("Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date...."); *see also Robinson, et al v. Michigan Consolidated Gas Co. Inc., et al*, 918 F.2d 579, 589 (6th Cir. 1990) ("we find that the Detroit Code provisions governing utility termination procedures are not preempted by either the terms or the 'general policies' of the Bankruptcy Code"); *In re: Weisel* and *Weisel v. Dominion Peoples Gas Co.*, 428 B.R. 185, 189 (W.D.Pa. 2010) (attached as Exh. B hereto) ("the Bankruptcy Court did not err in finding that Dominion was permitted to unilaterally terminate gas service to the Debtors based on post-petition unpaid bills without requirement of seeking either leave of the Court or relief from the automatic stay"); *Id.*. at 187 (noting, furthermore, that "the purpose and policy" of section 366 is "to prevent the threat of termination from being used to collect prepetition debts while not forcing the utility to provide services for which it may never be paid") (citing *In re: Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990)); *Memphis Light, Gas & Water Div. v. Earnestine Farley*, 135 B.R. 292, 293-94 (W.D.Tn. 1991) (holding that a utility refusing to restore service unless the debtor made full restitution for post-petition illegal use was "not prohibited under section 366(a) from requiring restitution of damages and lost services incurred as a result of post-petition illegal usage"); *In re: Morris v. Detroit Edison*, 66 B.R. 28, 29 (E.D.Mich 1986) ("The use of the word 'solely' in the statute implies that the utility may refuse to furnish services on other grounds. Here, the other grounds are that William Morris illegally tampered with the service lines and meters. This is a valid ground for refusing service").

wrongful behavior to escape its obligations to compensate the RLECs for providing access services, even if Halo's wrongful behavior is ongoing.

AT&T Kentucky admits it is delivering Halo traffic to the RLECs. (*See, e.g.*, AT&T Kentucky's Third Party Complaint, ¶ 11 ("AT&T delivered that [Halo] traffic for termination to other carries, including the RLECs (hereinafter, 'Halo traffic').").) AT&T Kentucky also admits that "the large majority of the traffic that Halo sends to AT&T Kentucky is not CMRS traffic," as Halo claimed. (AT&T Kentucky's Motion for Leave to File Third Party Complaint, ¶ 12; Formal Complaint, *BellSouth Telecommunications, LLC d/b/a AT&T Kentucky v. Halo Wireless, Inc.*, Case No. 2011-00283 ("AT&T Complaint"), p. 1 (July 26, 2011) ("Halo, in the furtherance of an access charge avoidance scheme, is sending large volumes of traffic to AT&T Kentucky that does not originate on a wireless network").)[3] In fact, AT&T Kentucky knew there was a problem with Halo's traffic at least as early as May of this year, before the RLECs even filed their Complaint, yet AT&T Kentucky failed to act. (*See* Email from Joe Pitard (AT&T) to S. Jones (Ballard), May 6, 2011, a true and accurate copy of which is attached hereto as Exhibit A ("We share your concerns about this traffic . . . .").

AT&T Kentucky further asserts that wireline-originated "traffic previously sent to AT&T Kentucky by Halo and terminated by AT&T Kentucky to AT&T Kentucky's end users is . . . subject to tariffed switched access charges." (AT&T Complaint, ¶ 14.) The RLECs agree. The Halo traffic delivered by AT&T Kentucky is "subject to tariffed switched access charges," for which AT&T Kentucky can be held liable regardless of its possible remedies against Halo directly.

[3] Kentucky courts are "bound to take as the truth" the allegations in a filed complaint. *Lamb v. Branch Banking & Trust Co.*, No. 2008-CA-001984, 2009 Ky. App. Unpub. LEXIS 1057, *10 (Dec. 18, 2009).

The Commission recently recognized this basic principle in a different case involving AT&T Kentucky. AT&T Kentucky refused to pay access charges for traffic, including some originated by third party carriers, terminated by South Central Telcom. The Commission held that "[i]f the traffic terminated by South Central is non-local toll traffic, then AT&T Kentucky must pay access charges." *South Central Telcom, LLC v. AT&T Kentucky*, P.S.C. Case No. 2006-00448, Order, June 22, 2010, p. 11.[4]

AT&T Kentucky's liability under the RLECs' access tariffs is uncomplicated. Its liability for access charges also makes sense as a matter of equity even if Halo traffic continues to flow. AT&T Kentucky was the first point of contact for the Halo traffic, and AT&T Kentucky carried a much higher volume of that traffic than any of the individual RLECs. It was therefore in the best position to spot the call detail discrepancies, expose the Halo access-avoidance scheme, and avoid or mitigate the impact of this entire problem.

AT&T Kentucky admits that "it has its own concerns about the nature of Halo's traffic and that it has been attempting to resolve those concerns with Halo," and it acknowledged those concerns at least as early as May 2011 before any Complaint was filed; yet, AT&T Kentucky did nothing to prevent or mitigate harm to itself or the RLECs until nearly two months after the RLECs filed their own complaint against AT&T Kentucky in this matter. (AT&T Kentucky's Answer, ¶ 12; Email, Ex. A.) Due to AT&T Kentucky's failure to prevent or mitigate these damages, equity demands that AT&T Kentucky not benefit from its lack of vigilance. AT&T Kentucky should pay the RLECs what it owes.[5]

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[4] AT&T Kentucky has filed a Motion for Clarification/Modification and for Extension of Time in the *South Central* case. That Motion is still pending.

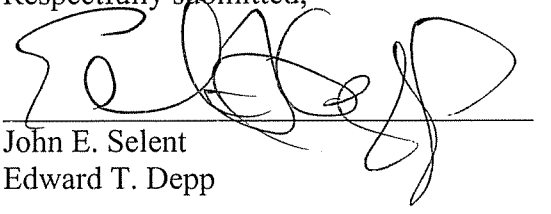
[5] By way of analogy: in the context of negotiable instruments, the bank that was in the best position to uncover a fraud is typically the party that bears the risk of loss resulting from that fraud. This policy is intended to inspire

For these reasons, whether or not the Commission has the authority to slow or halt the traffic from Halo, the Commission unquestionably retains the authority to order AT&T Kentucky to pay the RLECs' tariffed switched access charges for the termination of this traffic. The RLECs can recover all access charges from AT&T Kentucky without ever implicating the automatic stay of claims directly against Halo. Therefore, Halo's bankruptcy has no effect on the RLECs' complaint against AT&T Kentucky or the Commission's authority to grant the requested relief.

III. Conclusion.

While Halo's bankruptcy may impact AT&T Kentucky's ability to seek remedies from Halo, it has no effect on the RLECs' complaint against AT&T Kentucky regarding nonpayment of access charges. The automatic stay of claims against Halo does not extend to the RLECs' claims against AT&T Kentucky because AT&T Kentucky is, at most, a solvent co-defendant of Halo. Further, whether the Commission can slow or stop Halo's traffic, the Commission retains the authority to order AT&T Kentucky to compensate the RLECs at the tariffed rate for the RLECs' provision of access services. Not only does the Commission retain such authority, but it would be inappropriate to refuse to exercise that authority to reach a swift resolution on the question of financial liability. The RLECs' are already owed more than a million dollars in unpaid access charges; therefore, any unnecessary delay would be unreasonable.

Respectfully submitted,



John E. Selent
Edward T. Depp

greater vigilance among companies like AT&T Kentucky who are in the best position to catch frauds and scams before they materialize, and thereby minimize total losses.

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2500 National City Tower
Louisville, Kentucky 40202
(502) 540-2300 (Telephone)
(502) 585-2207 (Facsimile)
Counsel to the RLECs

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served by first-class United States mail on the following individuals this 2nd day of September, 2011.

Mary K. Keyer
General Counsel / Kentucky
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Louisville, KY 40203

Counsel for BellSouth Telecommunications, Inc.
d/b/a AT&T Kentucky

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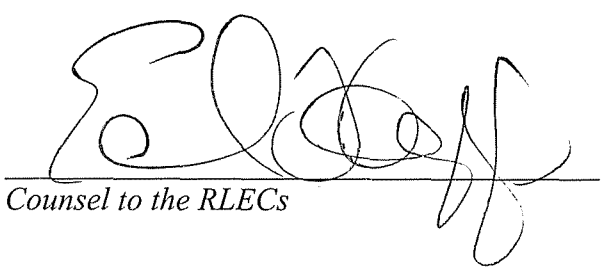
Counsel for Kentucky Telephone Company



Counsel to the RLECs

From: PITARD, JOE (ATTSI) [mailto:jp6837@att.com]
Sent: Friday, May 06, 2011 5:06 PM
To: sjones@brtc.net
Cc: BROZYNSKI, JOE (ATTSI); MADDOX JR., ELON W (ATTSI)
Subject: Ballard April 2011 CABS Access Invoice

Mr. Jones,

AT&T Kentucky is in receipt of Ballard's April Invoice(s) dated April 10, 2011 in the amount of [redacted](Net) . On this invoice, Ballard Rural Telephone issued credits for CMRS traffic totaling [redacted] minutes of use. AT&T's analysis of the EMI records provided to Ballard Rural Telephone shows [redacted] minutes of use in the amount $[redacted] should be credited on the amount billed to AT&T KY. Of this amount, AT&T believes that [redacted] minutes of use originated from Halo Wireless. We share your concerns about this traffic, but we do not agree that your calculations for this traffic are correct for IntraLATA toll compensation under the terms of the KY KSRP order. Therefore, AT&T Kentucky disputes [redacted] MOUs in the amount of $[redacted] and has deducted this amount from its payment to Ballard Rural Telephone . If Ballard Rural Telephone would like to join AT&T Kentucky in its efforts to address these concerns with Halo or the Kentucky Public Service Commission, let us know.

Joe Pitard

Sr. Financial Analyst

AT&T Wholesale Finance

205-321-2745

Email: Joe.Pitard@att.com

IN RE: MICHAEL WEISEL and LORI SUE WEISEL, Debtors; MICHAEL WEISEL and LORI SUE WEISEL, Movants/Appellants v. DOMINION PEOPLES GAS COMPANY, Respondent/Appellee

2:09cv537

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

428 B.R. 185; 2010 U.S. Dist. LEXIS 7871; Bankr. L. Rep. (CCH) P81,754

February 1, 2010, Decided
February 1, 2010, Filed

PRIOR HISTORY: *Weisel v. Dominion Peoples Gas Co. (In re Weisel), 400 B.R. 457, 2009 Bankr. LEXIS 249 (Bankr. W.D. Pa., 2009)*

COUNSEL: [**1] For MICHAEL WEISEL, LORI SUE WEISEL, Appellants: David A. Colecchia, LEAD ATTORNEY, Law Care, Greensburg, PA.

For DOMINION PEOPLES GAS COMPANY, Appellee: John P. Vetica, Jr., LEAD ATTORNEY, Moon Township, PA.

JUDGES: David Stewart Cercone, United States District Judge.

OPINION BY: David Stewart Cercone

OPINION

[*185] MEMORANDUM OPINION

I. INTRODUCTION

Before the Court is an appeal by Michael Weisel and Lori Sue Weisel (the "Weisels" or "Debtors"), from an order of the United States Bankruptcy for the Western District of Pennsylvania entering summary judgment in favor of Dominion Peoples Gas Company ("Dominion"), finding that Dominion did not violate the automatic stay provisions of *11 U.S.C. § 362* when it terminated gas service to the Weisels for failure to pay post-petition utility bills, and dismissing the Weisels' complaint against Dominion for violation of the automatic stay. This Court has jurisdiction of the appeal from the final order of the Bankruptcy Court pursuant to *28 U.S.C. § 158(a)*.

[*186] II. STATEMENT OF THE CASE

On October 26, 2006, the Weisels filed a petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Pennsylvania (the "Bankruptcy Court"). [**2] Prior to that date, the Weisels had an account with Dominion, Account No. 7460601283662 (the "pre-petition account"), whereby Dominion agreed to provide gas utility to the Weisels' residence at 308 Lloyd Avenue, Latrobe, Pennsylvania. In their Chapter 13 petition, the Debtors listed an unsecured, nonpriority debt owed to Dominion in the amount of $ 1,203.40 for pre-petition utility service. As a result of the bankruptcy petition, Dominion closed the Weisels' pre-petition account so that all utility charges prior to October 26, 2006, were included in the pre-petition account.

Dominion opened a post-petition account for the Weisels with an account balance of $ 0 as of the date of the bankruptcy petition. In conjunction with opening the new account, Dominion requested a post-petition deposit of $ 217.00 from the Weisels to be paid on or before December 22, 2006. On or about December 18, 2006, the Weisels paid $ 215.00 of the requested deposit. Dominion accepted the deposit and continued the gas utility service to the Debtors. The Debtors admit that they made sporadic payments to Dominion and accumulated a post-petition delinquency of $ 1,157.09. After providing Debtors proper notice pursuant [**3] to state law, Do-

minion terminated gas utility service to the Debtors' residence on April 9, 2008.

On April 30, 2008, the Wesel's filed a Complaint against Dominion alleging that Dominion violated *Title 11, United States Code, Section 362* of the Bankruptcy Code by terminating Debtors' post-petition gas service for failure to pay the post-petition utility bills without obtaining relief from the automatic stay, *11 U.S.C. § 362(d)*. Dominion filed a motion for summary judgment on June 23, 2008, seeking dismissal of the complaint with prejudice. The Bankruptcy granted summary judgment in favor of Dominion finding that Dominion was permitted to unilaterally terminate gas service to the Debtors based on post-petition unpaid bills without requirement of seeking either leave of the Court or relief from the automatic stay pursuant to *11 U.S.C. § 362(d)*. Debtors then appealed to this Court.

III. STANDARD OF REVIEW

This Court has jurisdiction to hear an appeal from the Bankruptcy Court pursuant to *28 U.S.C. § 158(a)*. In undertaking a review of the issues on appeal, a district court applies a clearly erroneous standard to a bankruptcy court's findings of fact - "[f]indings of fact, whether based on **[**4]** oral or documentary evidence, shall not be set aside unless clearly erroneous...." *See Federal Rule of Bankruptcy Procedure 8013*. In this instance, the parties agreed to submit the case upon a stipulation of facts [1]. Therefore, the only issues presented **[*187]** in this appeal are questions of law. The legal conclusions of a bankruptcy court are subject to plenary review. *In re Continental Airlines, 125 F.3d 120, 128 (3d Cir. 1997)*; *see also In re Hechinger, 298 F.3d 219, 224 (3d Cir. 2002)*; *In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002)*.

1 Debtors did, however, dispute that they ever received prior notice of Dominion's intent to terminate service. On that issue, the Bankruptcy Court found that: (1) in addition to Debtors' October bill, Dominion also mailed the Debtors a "10-Day Residential Shut-Off Notice" warning them that their service could be shut off by October 30, 2007, unless the bill was paid or payment arrangements were made; (2) Dominion also attempted to contact the Debtors by phone on October 19, 2007, leaving a message on their answering machine; (3) a similar notice was sent and two more phone calls were made in November 2007; and (4) Dominion again sent 10-Day Residential Shut-Off **[**5]** Notices to the Debtors in February and March 2008, and made efforts to contact them by telephone. *In re Weisel, 400 B.R. 457, 461 (Bankr. W.D. Pa. 2009)*.

IV. DISCUSSION

Upon the filing of a bankruptcy case, a creditor like Dominion is subject to the automatic stay provisions of the Bankruptcy Code. Pursuant to the stay, a creditor is prohibited from:

> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . .

11 U.S.C. § 362(a)(6). The Bankruptcy Code specifically addresses utilities at *11 U.S.C. § 366*, which provides specific protections for both the debtor and the utility. The Third Circuit noted that "the purpose and policy" of *§ 366* is "to prevent the threat of termination from being used to collect prepetition debts while not forcing the utility to provide services for which it may never be paid." *See In re Hanratty, 907 F.2d 1418, 1424 (3d Cir. 1990)*(quoting *Begley v. Philadelphia Elec. Co., 760 F.2d 46, 49 (3d Cir. 1985))*. In passing *§ 366*, "Congress struck a balance between the general right of a creditor to refuse to do business with a debtor and the debtor's need for utility services." *In re Hanratty, 907 F.2d at 1424*.

Section 366(a) **[**6]** provides the general rule that a utility may not alter, refuse, or discontinue service to a debtor "solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due." This general rule, however, is subject to the conditional language set forth in *§ 366(b)*, which provides:

> (b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 366(b).

Section 366(a), then, prohibits a utility from, *inter alia*, terminating service during the first twenty (20) days of a bankruptcy case based on a pre-petition debt. *See In re Whittaker, 882 F.2d 791, 793-794 (3d Cir. 1989)*. Af-

ter the expiration of that initial twenty (20) day period, *§ 366(b)* prohibits the utility [**7] from terminating service if the debtor has timely furnished adequate assurance of payment for post-petition service. *Id.*

In this instance, the Debtors filed their petition on October 26, 2006. Pursuant to *§ 366(b)*, the Weisels' gas service could be discontinued for failure to furnish "adequate assurance of payment" to Dominion on or after November 16, 2006, the twenty-first (21st) day following commencement of the bankruptcy case. Nothing in *§ 366(b)*, however, requires Dominion to terminate service, to the contrary, the plain language of the statute states that a " utility may . . . discontinue service . . . [for failure to furnish] . . . adequate assurance of payment . . ." By letter dated November 18, 2006, Dominion gave the Weisels until December 22, 2006, to pay a "security deposit of $ 217.00 to continue to receive natural gas service." On or about December 18, 2006, the Weisels paid $ 215.00 of the requested deposit, which was accepted by Dominion, and it continued the Weisels' natural gas service. After the Debtors accumulated a [*188] post-petition delinquency of $ 1,157.09, and after Dominion provided proper notice pursuant to Pennsylvania law, the Weisels' natural gas service was [**8] terminated on April 9, 2008, based upon a failure to pay post-petition utility bills.

Clearly, Dominion terminated service, not based upon the Debtors' failure to provide adequate assurance of payment under *§ 366(b)*, but based upon an accumulated post-petition delinquency of $ 1,157.09. This Court, therefore, disagrees with the Bankruptcy Court's holding that the Weisels' failure to make adequate assurance of payment within the twenty day period set forth in *§ 366(b)*, despite Dominion's obvious waiver of the statutory twenty day period, allowed Dominion to terminate the service based upon a failure to provide adequate assurance, nearly a year and a half after commencement of the bankruptcy case. Dominion had the right to discontinue the natural gas service to the Debtor's on or after November 16, 2006 [2]. It chose instead to work with the Weisels and consented to a continuation of the natural gas service if the Weisels paid a security deposit by December 22, 2006. Dominion accepted the $ 215.00 deposit remitted by the Debtors on or about December 18, 2006, and continued to provide utility service. As a result, it was Dominion that lost the right to discontinue service based upon a failure [**9] to furnish "adequate assurance of payment" under *§ 366(b)*.

> 2 Dominion, obviously, remained obligated to follow applicable state law with respect to any such termination as the state procedural protection provided to the Debtors is not abrogated by the adequate assurance provision of *§ 366(b)*.

The result below does not change, however, as this Court finds that Dominion had the right to terminate the Weisels' natural gas service for failure to pay post-petition utility service delinquencies. It is well-established that *§ 366* permits a utility to terminate service to a debtor or trustee who has posted adequate assurance but fails to make post-petition payments on the utility service, and may do so without seeking relief from the automatic stay as long as the utility follows its state law termination procedures. *See Begley v. Philadelphia Elect. Co., 760 F.2d at 49-51*; *Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 588 (6th Cir. 1990)*; *In re Security Investment Properties, Inc., 559 F.2d 1321, 1325 (5th Cir. 1977)*; *In re Jones, 369 B.R. 745, 752 (B.A.P. 1st Cir. 2007)*; *In re Conxus Communs., Inc., 262 B.R. 893, 899 (D. Del. 2001)*; *In re Carter, 133 B.R. 110, 112 (Bankr. N.D. Ohio 1991)*. [**10] The Third Circuit in *Begley* specifically stated:

> The restriction on termination in *section 366(a)* bars only those terminations which issue "solely on the basis" that a debt incurred prior to the bankruptcy order, was not paid when due. Thus, by implication, termination for failure to pay post-petition bills would not seem to be barred by *section 366(a)*. . . This reflects an understanding that the utility will be allowed to commence termination procedures once a post-petition payment is missed, despite the prior security or "assurance" deposit.

Begley v. Philadelphia Elect. Co., 760 F.2d at 49-51. Several other courts have similarly permitted termination for failure to make post-petition payments concluding that the use of the word "solely" in *§ 366(a)* implied that a utility may refuse to furnish services on grounds other than the commencement of the bankruptcy case or because of outstanding pre-petition debts. *See Memphis Light, Gas & Water Division v. Farley, 135 B.R. 292, 294 (W.D. Tenn. 1991)*; *Hendrickson v. Philadelphia Gas Works, 672 F. Supp. 823, 834* [*189] *(E.D. Pa. 1987)*; *In re Morris, 66 B.R. 28, 29 (E.D. Mich. 1986)*; *In re Webb, 38 B.R. 541, 544 (Bankr. E.D. Pa. 1984)*.

The Debtors [**11] argue that the result of a Chapter 13 case should be different from the result in *Begley* and relief from stay should be required because, contrary to *11 U.S.C. § 362(a)(3)*, Dominion's termination of service is an attempt to exercise dominion and control over the bankruptcy estate. Based upon such proposition, any creditor seeking payment of a post-petition bill, invoice, etc. in a Chapter 13 bankruptcy would be required to seek relief from the stay. This

would be unduly burdensome on creditors as well as on the Courts. Moreover, the leading bankruptcy treatise does not distinguish between chapters of the Bankruptcy Code in applying *§ 366(b)* stating:

> [t]he provision of adequate assurance does not prevent a utility from terminating service to the debtor or the estate if post-petition payments for utility services are not made. Such a termination must follow the procedure prescribed under nonbankruptcy law for utility terminations . . . .

3-366 *Collier on Bankruptcy P 366.03[1]*(15th Ed. 2009). Therefore, this Court will not distinguish the rights of a utility under *§ 366(b)* based upon specific chapters of the Bankruptcy Code. Accordingly, the Court finds that the Bankruptcy Court did not **[**12]** err in finding that Dominion was permitted to unilaterally terminate gas service to the Debtors based on post-petition unpaid bills without requirement of seeking either leave of the Court or relief from the automatic stay.

V. CONCLUSION

Based on the foregoing, the decision of the Bankruptcy Court granting summary judgment in favor of Dominion and dismissing the Weisels' Expedited Complaint for Violation of the Automatic Stay, finding that Dominion did not violate the automatic stay provisions of *11 U.S.C. § 362* when it terminated the Weisel's natural gas service, shall be affirmed. An appropriate order follows.

Cercone, J.

ORDER OF COURT

AND NOW, this 1st day of February, 2010, upon consideration of the appeal from the decision of the United States Bankruptcy Court for the Western District of Pennsylvania dated February 9, 2009, filed on behalf of the Debtors, Michael Weisel and Lori Sue Weisel, the response thereto, and the briefs filed in support thereof, in accordance with the Memorandum Opinion filed herewith,

IT IS HEREBY ORDERED that the decision of the Bankruptcy Court holding that Dominion Peoples Gas Company did not violate the automatic stay provisions of *11 U.S.C. § 362* when **[**13]** it terminated the Weisel's natural gas service on April 9, 2008, is **AFFIRMED**. The Clerk shall mark this case closed.

/s/ David Stewart Cercone

David Stewart Cercone

United States District Judge